

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN HENRY ADAMS,

Defendant-Appellant.

UNPUBLISHED

September 25, 2003

No. 240844

Oakland Circuit Court

LC No. 2001-181442-FC

Before: Smolenski, P.J., and Markey and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (sexual penetration of a victim under thirteen years of age where the actor is a member of the same household), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a victim under thirteen years of age where the actor is a member of the same household), and one count of assault and battery, MCL 750.811. Defendant was sentenced to 19 to 60 years' imprisonment for each of the first-degree criminal sexual conduct convictions, 3 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction, and 90 days' imprisonment on the assault and battery conviction. Defendant appeals by right. This appeal is being decided without oral argument, pursuant to MCR 7.214(E). We affirm.

Defendant first argues that the prosecutor impermissibly used defendant's pre-arrest silence as substantive evidence of his guilt by inferring that an innocent person would have contacted the police to deny the victim's allegations. But, because defendant's silence did not occur during a custodial interrogation, nor was it in reliance on *Miranda*¹ warnings, the silence is not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992). Thus, its admissibility as substantive evidence indicative of a guilty conscience is dependent only on Michigan's rules of evidence. *Id.* at 167. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Here, the prosecution sought to introduce evidence that defendant had been avoiding police contact. After the victim made her allegations, the police scheduled an interview with defendant. However, defendant failed to attend the interview, even though he knew of the allegations. Subsequent efforts by the police to contact defendant were unsuccessful. Also, when police arrived at defendant's sister's house to arrest him, the person who answered the door stated that defendant was not there. After searching the house and calling out defendant's name, defendant did respond and was arrested in a back room of the house. On these facts, we find the testimony to be probative of defendant's state of mind. Further, defendant had the opportunity, and seized it, to explain his version of events. In addition, the jury received a limiting instruction that it could either consider defendant's silence as indicative of a guilty mind, or attribute purely innocent reasons for his silence. Therefore, we hold that the trial court did not abuse its discretion in admitting the testimony as substantive evidence of defendant's consciousness of guilt.

Defendant also argues that the trial court erred in allowing testimony regarding an incident where defendant allegedly placed a knife against the throat of the victim's mother while the victim was present in the room. Defendant asserts that the testimony was inadmissible as a prior bad act under MRE 404(b), being irrelevant and inflammatory. But, defendant's assertion is irrelevant because the testimony was not admitted pursuant to MRE 404(b).

Plaintiff argues that the testimony was proper impeachment of defendant's credibility and was admissible to show that the victim had reason to fear defendant. Questions that bear on a witness' credibility are generally relevant. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995). In this case, both of defendant's children testified that defendant told them not to tell anyone about the incident. The victim also testified that defendant had spanked her with a belt on one occasion and she was scared of him. On cross-examination, defendant denied his children had any reason to fear him, denied "ever laying a hand on them," and stated that he could not specifically say whether the children had seen him in a violent mood. When asked, defendant denied the knife incident occurred. On these facts, we find the testimony was relevant to show whether defendant was testifying truthfully regarding whether the victim's fears were well founded. *Id.*

Nonetheless, relevant evidence may be excluded when its probative value is "substantially outweighed by the danger of unfair prejudice." *Id.* at 75; emphasis in original. "Unfair prejudice" exists where there is a danger that the jury will give the evidence undue weight and the proponent of the evidence has less prejudicial means of introducing the substance of the evidence. *Id.* at 75-76, quoting *Sclafani v Peter S Cusimano*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983).

Here, defendant testified that the victim had no reason to fear him, and that she had not ever seen defendant and her mother fight. While the evidence certainly had probative value, there was no evidence as to when the knife incident allegedly occurred. Furthermore, the prosecutor could have questioned the victim further about why she was scared of defendant and then confronted defendant with this evidence. But, the jury did receive a cautionary instruction regarding the evidence's limited purpose. Generally, a court's decision on a close evidentiary question is not abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000). Nevertheless, we find any error was harmless because, after examining the entire case, it does not affirmatively appear that it is more probable than not that the admission of the

testimony was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Michael R. Smolenski

/s/ Jane E. Markey

/s/ Kurtis T. Wilder